

No. 87-1684

SUPREME COURT, MS.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,  
*Petitioner,*  
v.

ESTATE OF RAY LAMAR WESSON, M.D., DECEASED, BY  
EMOGENE HALL, ADMINISTRATRIX AND AS GUARDIAN  
OF RAY LAMAR WESSON, JR., ALLISON LYNN WESSON,  
DAVE NEWTON WESSON AND JASON MANNING WESSON,  
MINORS,  
*Respondent.*

On Petition for a Writ of Certiorari to the  
Supreme Court of Mississippi

**BRIEF IN OPPOSITION**

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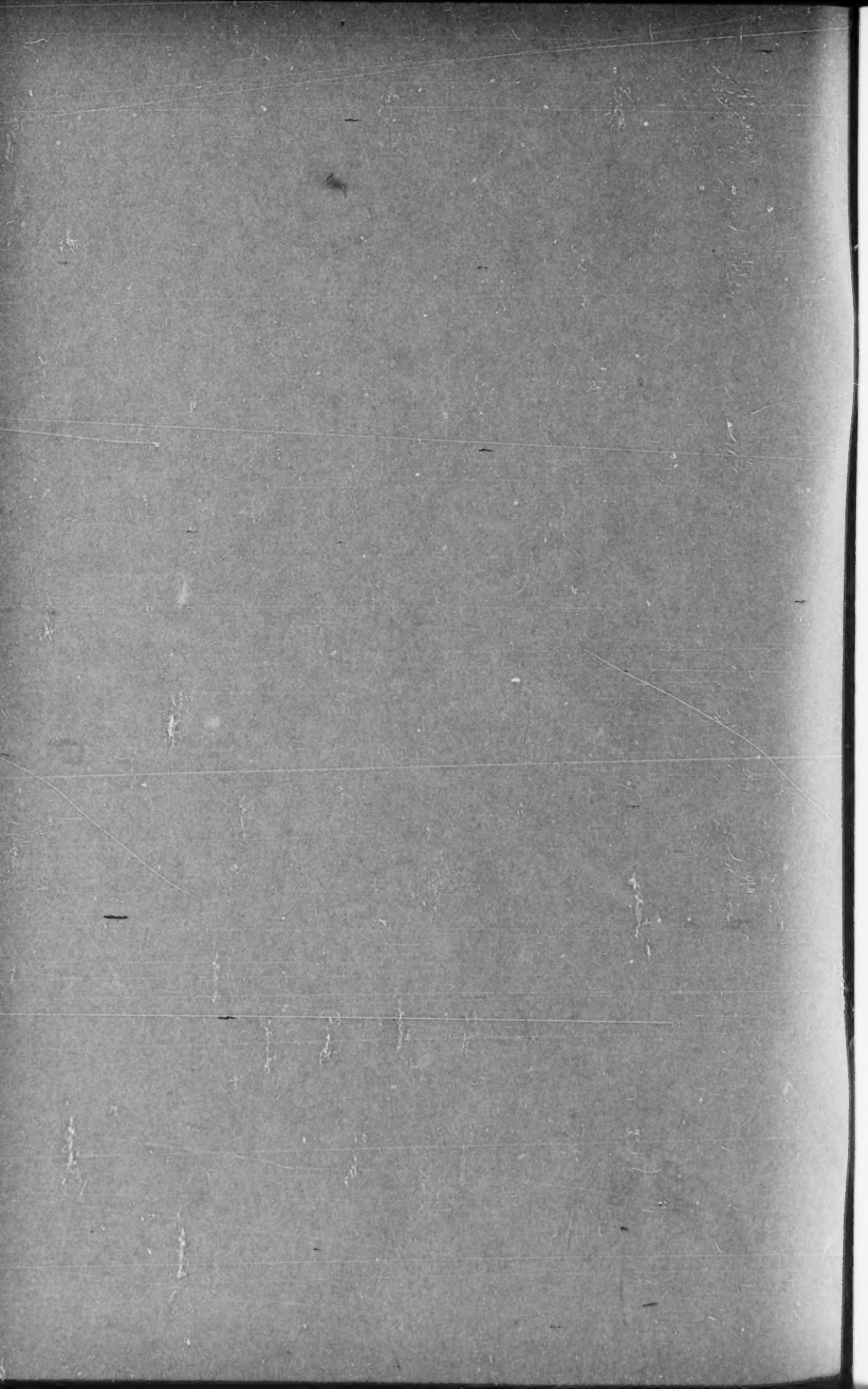
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On Petition for a Writ of Certiorari to the  
Supreme Court of Mississippi

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**BRIEF IN OPPOSITION**

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**STATEMENT OF THE CASE**

This case involves an award of punitive damages against petitioner, Mutual Life Insurance Company of New York (Petitioner or "MONY"), on the basis of a jury finding that petitioner acted in bad faith in making a calculated decision to deny full payment on a life insurance policy. The policy covered Dr. Lamar Wesson, a prominent Mississippi physician who was killed with his wife in a plane crash while accompanying the United States Amateur Boxing Team to Poland in 1980. After the crash, respondent (who was the administratrix and guardian of the beneficiaries of the life insurance policy—the four Wesson children, age 8 to 15) sought recovery

on the policy. Petitioner refused to pay on the ground that the policy had lapsed as a result of nonpayment of one premium. The policy, however, contained an "automatic premium loan" ("APL") provision that prevented lapse of the policy in the event of nonpayment. Utilizing intentionally falsified computer records that showed no APL on the Wesson policy, and ignoring the plain language of the policy itself, petitioner repeatedly refused to pay. Respondent brought suit on behalf of the children for the face value of the policy and for punitive damages. At trial, petitioner conceded liability for the face value of the policy. The jury returned a verdict for respondent for the face value of the policy and also for \$8 million punitive damages. As a result of facts uncovered during the case, thousands of petitioner's life insurance policies were found to have been falsely entered into computer records as lacking APL even though those policies did have APL provisions.

The Mississippi Supreme Court affirmed the jury finding of liability and the award of punitive damages, conditioned upon respondent's acceptance of a remittitur in the sum of \$6.5 million, which reduced the punitive damage award to \$1.5 million. The court decided upon the remittitur after applying established state law standards to determine whether the award was appropriate. Mississippi law requires consideration of whether the amount of punitive damages is (a) necessary as punishment; (b) necessary to deter similar conduct by others; and (c) proportionate to the defendant's ability to pay. *Mutual Life Insurance Company of New York v. Wesson*, 517 So.2d 521, 532 (Miss. 1987), reprinted in Appendix to Petition for Certiorari ("Appendix") at 1a, 20a.

The opinion of the Mississippi Supreme Court sets forth in great detail all pertinent facts of this case, and respondent incorporates all of the state court findings by reference. However, because petitioner's statement of the case bears almost no resemblance to the facts found by

the Mississippi courts, respondent is obliged to correct the serious misimpressions created by that statement:

*First*, petitioner's attempt to portray its refusal to pay the face amount of Dr. Wesson's life insurance policy as simple negligence is foreclosed by the jury instructions, the jury findings, and the record evidence. Under an instruction proposed by *petitioner*, and given by the court, the jury found that petitioner's conduct was not "merely negligent," but was "so grossly negligent and reckless as to be the same as an intentional denial."<sup>1</sup> The majority of the Mississippi Supreme Court concluded that "MONY's contention that it is guilty only of simple negligence is overwhelmingly rebutted" by the evidence. *Appendix 12a*. For example, the majority found that petitioner's action in not entering the APL provision into its computer record of Dr. Wesson's policy was "intentional" and was "in accordance with [petitioner's] policies and procedures." *Appendix 12a*.<sup>2</sup> The majority also found that implementation of this corporate "policy" of deleting APL even when APL had been requested "was not an isolated incident, but, rather, included a large number of policies." *Appendix 12a*. The three judges who dissented from the majority's decision to order a remittitur thought MONY's conduct was sufficiently reprehensible to warrant the full award. *Appendix 37a*. They expressed "agreement with the majority in finding MONY's conduct and practices *intentional* and detrimental, not only to the plaintiffs here involved but to other policyholders as well and that it warranted an award of punitive damages."

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<sup>1</sup> That instruction is reproduced in note 15, *infra*.

<sup>2</sup> An employee of petitioner testified that although she knew the application for the policy requested APL, she gave "instructions that Dr. Wesson's policy be issued without APL," because "she was aware of MONY's *policy* regarding APL . . . ." *Appendix 4a* (emphasis added).

*Appendix 35a* (emphasis added).<sup>3</sup> Thus, every member of the Mississippi Supreme Court agreed that petitioner “had no arguable, legitimate or justifiable reason to deny the claim . . . .” *Appendix 16a; id.*, 12a.

*Second*, petitioner’s attempt to portray this as “an ERISA case” by assuming the applicability of the Employee Retirement Income Security Act (“ERISA”) misrepresents the nature of the proceedings in the trial court. Petitioner is seeking to transform this into an ERISA case so it can claim that ERISA’s preemption provision, 29 U.S.C. § 1144(a), precludes any award of punitive damages. But petitioner never raised any ERISA issue at trial. The record thus contains no evidence, jury instructions, or jury findings with respect to whether Dr. Wesson’s life insurance policy was an “employee benefit” under an ERISA plan. As petitioner acknowledges in a footnote, none of the material cited in petitioner’s statement of the case to support its claim that this is an ERISA case was ever received in evidence at trial. *Petition* at 3 n.1. Petitioner thus has no basis in the record for its claim that “[t]he is an ERISA case.” *Petition* at 5.

### SUMMARY OF ARGUMENT

Petitioner asks this Court to resolve three federal constitutional questions respecting the award of punitive damages in this case. Petitioner argues that the punitive damage award: (i) violates the Excessive Fines Clause of the Eighth Amendment because it is allegedly disproportionate to petitioner’s conduct and to criminal fines for analogous conduct; (ii) violates the Due Process Clause of the Fourteenth Amendment because it was imposed without criminal procedural protections; and (iii) is preempted by ERISA. *None* of these federal questions

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<sup>3</sup> No member of the court dissented from the conclusion that the evidence justified an award of punitive damages. Justice Robertson said he “would assent” to that conclusion; he dissented only because, in his view, the award was preempted by ERISA. *Appendix 34a*.

was properly presented to the Mississippi courts. Consequently, the Mississippi courts did not pass on any of them. Petitioner's failure properly to raise these questions in the state courts has resulted in a record devoid of evidence, jury instructions or findings of fact essential to resolution of those questions. As a result of petitioner's procedural defaults, this Court is without authority to review the federal questions presented in the petition. (Point I).

In any event, the questions presented in the petition do not raise any substantial issue of federal law that warrants this Court's review. The decision below is not even alleged to conflict with any other decision of a state court of last resort or of a federal court of appeals. It is not inconsistent with any decision of this Court, and it does not present any important question of federal law that should be decided by this Court in the context of this case. (Point II).

### ARGUMENT

#### **I. PETITIONER'S FEDERAL CONSTITUTIONAL CHALLENGES TO THE PUNITIVE DAMAGE AWARD WERE NOT PROPERLY PRESENTED TO THE MISSISSIPPI COURTS, WERE NOT DECIDED BY THE MISSISSIPPI COURTS, AND SHOULD NOT BE CONSIDERED BY THIS COURT.**

This Court does not have statutory authority to review the state court judgment at issue here unless the petitioner "specially set up or claimed" a "title, right, privilege or immunity" under federal law *in the state court proceedings*. 28 U.S.C. § 1257(3).<sup>4</sup> The requirement that a federal question be properly presented in the state

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<sup>4</sup> The Court can also review state court judgments in which a federal or state statute has been "drawn into question on the ground of its being repugnant to the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1257(3), but petitioner never drew into question the validity of any state or federal statute.

court proceedings ensures development of the necessary factual record for just and proper resolution of the federal question, furthers a strong interest in federalism and comity by respecting the authority and competence of state courts to adjudicate federal claims in the first instance, and precludes unnecessary constitutional adjudication by giving the state court the opportunity to resolve the case on an adequate and independent state ground. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). See also *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983).

None of the three federal constitutional bases on which petitioner challenges the award of punitive damages in this case was “specially set up or claimed” in a proper manner in the state court proceedings. Petitioner’s Fourteenth Amendment Due Process claim was never raised at any stage in the state proceedings. Its Eighth Amendment Excessive Fines claim and its ERISA preemption claim under the Supremacy Clause, U.S. Const., Art. 6, were not raised in the proper and timely manner provided under Mississippi law—indeed, neither claim was even mentioned until after petitioner had filed its briefs in the Mississippi Supreme Court. For this reason the Mississippi Supreme Court declined to address the Excessive Fines and ERISA claims. Petitioner’s procedural defaults in the state court proceedings preclude the exercise of certiorari jurisdiction under 28 U.S.C. § 1257(3), constitute an adequate and independent state ground for the judgment below, and foreclose all possibility of meaningful review of those federal constitutional questions in this Court. For these reasons, the petition for certiorari should be denied.

**A. Petitioner Never Raised A Due Process Objection To The Award Of Punitive Damages At Any Stage In The State Court Proceedings.**

In case after case, this Court had made clear that it is without authority to “decide federal constitutional issues raised here for the first time.” *Cardinale v. Louisiana*,



394 U.S. 437, 438 (1969). *Accord Exxon Corp. v. Eager-ton*, 462 U.S. 176 (1983); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983); *Webb v. Webb*, 451 U.S. 493, 499 (1981). This principle forecloses consideration of petitioner's Due Process claim.

Petitioner now argues that the state court proceedings violated the Due Process Clause of the Fourteenth Amendment because punitive damages were assessed "absent some or all of the same procedural rights as are enjoyed by defendants in criminal cases." *Petition* at (i). But petitioner has not "specif[ied] the stage in the proceedings, both in the first instance and in the appellate court," at which its Due Process claim was raised, as required by S. Ct. Rule 21(h), because that claim was never raised at any stage. Even if that Due Process issue were substantial on the merits—and it is not, *see* Point II.A *infra*—petitioner's failure to present it in any form at any stage below precludes this Court from exercising its certiorari jurisdiction to decide the issue now.

Petitioner acknowledges that it failed to raise the Due Process issue below, but seeks to paper over this otherwise dispositive defect by arguing in a footnote that its Due Process argument is a "mere enlargement" of a claim it allegedly raised under the Excessive Fines Clause of the Eighth Amendment. *Petition* at 11 n.3. This argument must fail for three reasons:

*First*, in no reasonable sense can petitioner's Excessive Fines claim be said to encompass the Due Process claim petitioner seeks to raise in this Court. The Excessive Fines claim arises under the Eighth Amendment and challenges the punitive damage award on the substantive ground that "it is disproportionate to actual damages and vastly greater than any penalties prescribed by the Mississippi legislature for similar or analogous allegedly criminal business activities." *Petition* at (i) (Questions Presented). The Due Process claim arises directly under the Fourteenth Amendment and challenges the punitive

damage award on the procedural ground that it was imposed "absent some or all of the same procedural protections as are enjoyed by defendants in criminal cases." *Id.* These claims are entirely distinct. An award of punitive damages could be imposed under procedures that provided civil defendants all the procedural protections afforded to criminal defendants, and yet be disproportionate to both actual damages and criminal penalties for analogous business behavior. Conversely, an award of punitive damages could be proportionate to both actual damages and analogous criminal penalties and yet have been imposed under a procedure that lacked all the procedural protections petitioner demands in its Due Process claim. The Eighth Amendment Excessive Fines claim seeks a *substantive* constitutional limit on the amount of punitive damages available to civil plaintiffs, whereas the Fourteenth Amendment Due Process claim seeks criminal *procedural* protections when a civil plaintiff seeks punitive damages.

*Second*, no precedent supports the expansive jurisdictional interpretation petitioner urges. To the contrary, this Court has made clear—in the very case petitioner invokes to support its argument—that a federal question not raised in the state court will be considered a "mere enlargement" only if it is "necessarily connected" to a question properly raised below "so that the state court could not have given judgment [on the question that was raised] without deciding it." *Dewey v. Des Moines*, 173 U.S. 193, 198-199 (1899). As respondent has demonstrated, petitioner's Due Process claim is wholly unconnected to its Excessive Fines claim. The Mississippi courts could readily have determined whether the Excessive Fines Clause of the Eighth Amendment imposes substantive limits on the size of punitive damage awards without resolving the distinct issue whether the Fourteenth Amendment Due Process Clause requires criminal procedural protections in cases where civil plaintiffs seek punitive damages.



*Dewey* stands for no more than the proposition that a petitioner is not prevented from urging additional arguments, not presented below, in support of a federal claim that *was* properly presented below. *Id.* at 198 (“Parties are not confined here to the same *arguments* which were advanced in the courts below *upon a Federal question there discussed*”) (emphasis added); see also *Illinois v. Gates*, 462 U.S. 213, 248 (1983) (White, J., concurring). Indeed, in *Dewey* a petitioner who had “raised only one Federal” Due Process question in the state courts was not permitted to raise a related but distinct federal Due Process question in this Court because the related question had not been presented to the state court. 173 U.S. at 198, 198-200. Petitioner’s Due Process claim in the present case cannot reasonably be understood as simply another strain of argument in support of its Excessive Fines claim. It is instead a wholly distinct claim, based on a wholly distinct provision of the Constitution, that cannot be considered a “mere enlargement” of the Excessive Fines claim.

*Third*, as respondent will demonstrate in Point I.B. *infra*, the Excessive Fines Clause question itself was not properly raised or decided in the Mississippi courts, and therefore suffers from fatal jurisdictional flaws that preclude this Court from considering that question as well. Thus, even if the Due Process claim were a mere enlargement of the Excessive Fines claim—and it is not—the Excessive Fines claim cannot serve as the means for petitioner to evade the prerequisites of section 1257(3) with respect to the Due Process claim. If the Court is precluded from hearing the Excessive Fines claim, it cannot have jurisdiction over a “mere enlargement” of that claim.

The sound jurisdictional purposes undergirding the limitations on the scope of this Court’s certiorari jurisdiction would be thwarted by review of the Due Process issue in this case. The Mississippi Courts have had no

opportunity to consider petitioner's claim that criminal procedural protections must attach when a civil plaintiff seeks punitive damages. Indeed, even in its petition, petitioner specifies neither the respect in which the state court procedures in this case fell short nor the additional procedural protections petitioner believes the Constitution demands. Thus, this Court lacks the benefit of any considered treatment of the issue by the courts most familiar with both the facts of this case and the nature of Mississippi procedures. Additionally, the Mississippi Supreme Court has had no opportunity to decide whether additional procedures might be required as a matter of state law, thus obviating federal constitutional adjudication by this Court. *See Illinois v. Gates*, 462 U.S. at 222 (presentation of federal issue first to state court "permits a state court . . . to rest its decision on an adequate and independent state ground"); *cf. Ashwander v. TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). Accordingly, this Court should decline to consider petitioner's Due Process question.

**B. Petitioner Failed To Raise An Excessive Fines Clause Challenge To The Punitive Damage Award At The Proper Stage In The State Court Proceedings. For That Reason, The Mississippi Supreme Court Declined To Consider The Excessive Fines Clause Claim, And This Court Should Not Consider That Claim Now.**

The petition also challenges the size of the punitive damage award in this case on the ground that it violates the Eighth Amendment's prohibition of excessive fines. But petitioner did not raise that issue at any appropriate stage of the state proceedings. Petitioner did not rely on the Excessive Fines Clause in its answer or amended answers. Nor did petitioner request or object to jury instructions on that ground. Even after the jury awarded punitive damages, petitioner failed to raise *any* constitutional issue in its comprehensive motion for judgment

notwithstanding the verdict, which assigned 48 separate errors. Nor did petitioner raise any Eighth Amendment claim in its assignments of error to the Mississippi Supreme Court, which, under then-Rule 6 of the Mississippi Supreme Court Rules, had to be filed on or about February 12, 1985. Petitioner belatedly attempted to raise an Excessive Fines claim for the first time in a motion to amend its assignment of errors. That motion was filed on November 13, 1986, only six days before oral argument in the Mississippi Supreme Court, and approximately eighteen months after briefs had been filed with that court. *Appendix 113a.*

Petitioner's last-minute effort to revise its earlier tactical judgments or oversights was untimely under well-established and consistently followed rules of the Mississippi Supreme Court. See *Estate of Briscoe v. Briscoe*, 255 So.2d 313, 314 (Miss. 1971); *Mississippi State Highway Comm'n v. Rives*, 271 So.2d 75, 79 (Miss. 1973). As petitioner admits, the Mississippi Supreme Court denied petitioner's motion on the ground of inexcusable untimeliness and declined to consider the Excessive Fines claim. *Petition* at 12-13. This explicit finding of untimeliness is an adequate and independent state ground that bars review by this Court. It has long been established that for this Court to have jurisdiction to review a state court decision, "the essential federal question must have been especially set up there at the proper time and in the proper manner." *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919). Where a state supreme court decides, in accord with the consistent practice of that State, that an issue is untimely, that constitutes an adequate state ground for resolving the issue, and this Court lacks jurisdiction. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 182-183 n.3 (1983).

With respect to the Excessive Fines Clause issue, the present case is similar to *Allstate Ins. Co. v. Hawkins*, No. 87-40, a case in which a petition for certiorari was

recently denied by this Court. 100 S.Ct. 212 (1987). In *Hawkins*, the petitioner sought to raise an Excessive Fines Clause claim virtually identical to the claim petitioner seeks to raise in this case. In *Hawkins*, as in the present case, the petitioner had failed to raise and preserve its Excessive Fines claim in a proper and timely manner in the state court proceedings. Identical considerations warrant a denial of certiorari in the present case.

**C. Petitioner's Claim That ERISA Preempts An Award Of Punitive Damages Under Mississippi's Law Of Bad Faith Was Not Properly Presented To The Mississippi Courts, Was Not Considered By The Courts Below, And Should Not Be Considered By This Court.**

Petitioner now contends that ERISA preempts Mississippi's law of bad faith punitive damages as applied in this case. *Petition* at 5-11. But petitioner failed to raise the affirmative defense of ERISA preemption at any appropriate point during the proceedings below. Petitioner did not rely upon ERISA preemption in its answer or amended answers, even though Rule 8 of the Mississippi Rules of Civil Procedure requires that affirmative defenses be asserted in an answer. Nor did petitioner request or object to jury instructions on that ground. Even after the jury awarded both compensatory and punitive damages, petitioner did not rely on ERISA preemption in its motion for judgment notwithstanding the verdict. Nor did petitioner raise any ERISA preemption claim in its assignment of errors to the Mississippi Supreme Court, or even in briefs and oral argument to that court. Petitioner made only one effort to discuss this issue, in a belated letter (which petitioner now characterizes as a "letter brief"—see *Petition* at 10) to the Mississippi Supreme Court six months *after* oral argument in that court. That attempt was untimely and procedurally inadequate because the Mississippi Supreme Court Rule

applicable at the time, Rule 28, provided that a party seeking to brief or raise a new issue after oral argument must first obtain "leave of court" to do so, and petitioner never filed a motion requesting such leave.<sup>5</sup> The Mississippi Supreme Court specifically declined to address petitioner's ERISA argument because petitioner had failed to raise the argument in a timely and appropriate manner at trial and on appeal. *Appendix 13a, n.3.*

Petitioner's failure to "specially set up or claim" the federal law ERISA defense in a proper manner in the state courts, as required by section 1257(3), precludes review of the ERISA preemption issue by this Court. Indeed, the present case is squarely controlled by *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983). In *Exxon*, as here, petitioner argued that federal legislation preempted a state law. Because the petitioner had failed to raise the preemption issue in the trial court, and the state supreme court had as a result declined to rule on the issue, this Court refused to consider the issue on certiorari. *Id.* at 182-183 n.3. And in *Exxon*, as here, the petitioner's failure to follow state procedures constituted a procedural default that amounted to an adequate and independent state ground supporting the state court's refusal to consider the preemption claim.

In *Cardinale v. Louisiana*, 394 U.S. 437 (1969), this Court made clear that a federal question must be properly presented in the state courts in part because questions not raised in state court proceedings "are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind."

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<sup>5</sup> This Court has also required that federal questions be presented to the state courts in pleadings and motions. For that reason "[b]riefs and oral arguments before state courts . . . cannot be used to establish that a federal question was raised. *Live Oak Ass'n v. Railroad Commission*, 269 U.S. 354, 357-58 (1926); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934)." Stern, Gressman & Shapiro, *SUPREME COURT PRACTICE* 157 (6th ed. 1986).

*Id.* at 439. Petitioner's effort to obtain review of an ERISA preemption issue in this case suffers from precisely the deficiencies identified in *Cardinale*. On the merits, the preemption issue is completely dependent on complex and unresolved factual questions respecting the applicability of ERISA to the life insurance policy at issue in this case. Because petitioner failed to raise any ERISA defense in the trial court, the record lacks necessary evidence and at least three factual findings crucial to the determination whether ERISA would preempt the particular award of punitive damages in this case:

*First*, as petitioner admits, *see Petition* at 3 n.1, petitioner did not introduce into evidence the 1974 employee pension plan under which the life insurance policy at issue in this case was allegedly purchased. Petitioner acknowledges that the policy at issue was purchased in 1974, two years *before* the employee pension plan was allegedly amended "to conform to" ERISA. *Petition* at 2-3. That concession alone strongly suggests that the policy at issue was not purchased, and could not have been purchased, as part of an ERISA plan. Furthermore, the 1976 employee pension plan petitioner has included in the *Appendix* at 74a was also not introduced into evidence. *See Petition* at 3, n.1. Thus, the record contains no finding, and it is not possible to determine, whether the language in the 1976 plan specifying the limited conditions under which the plan could purchase a life insurance policy as an employee benefit, was contained in the 1974 plan under which Dr. Wesson's life insurance policy was allegedly purchased.<sup>6</sup>

*Second*, the language of the 1976 plan reproduced in petitioner's appendix indicates that the insurance policy at issue in this case *could not* have been purchased pur-

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<sup>6</sup> At trial, petitioner made passing reference to the 1976 plan, but only in order to establish an agency relationship between Dr. Wesson and another individual. Petitioner made no effort at trial to demonstrate that ERISA governed the plan.



suant to the terms and conditions of that plan. Article IX of the 1976 plan authorizes the purchase of life insurance for employees *only* if the insurance policy contains "an annuity option [to] . . . provide . . . retirement income benefits," *Appendix* at 110a, but the policy at issue in this case (which petitioner did not include in the *Appendix*) contains no such annuity option.

*Third*, because petitioner's fraudulent deletion of the APL provision from its computer, which triggered the chain of events that inexorably resulted in denial of the claim, occurred before January 1, 1975, the effective date for ERISA's preemption provision, 29 U.S.C. § 1144(b)(1), the trial court never had the opportunity to determine whether ERISA preempted respondent's state law claim for damages flowing directly from this initial act by petitioner.

Petitioner seeks to evade the consequences of its failure properly to raise the ERISA issue in the Mississippi Courts by arguing that this Court's interpretation of ERISA in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. —, 95 L.Ed.2d 39 (1987), was a supervening "change of law" binding upon the Mississippi Supreme Court. *Petition* at 9. This argument is frivolous. Had petitioner properly presented the ERISA defense to the trial court, properly preserved the defense in its assignments of error, and properly presented the defense on appeal, then the Mississippi Supreme Court would arguably have been bound to apply the holding of *Pilot Life* if indeed ERISA applied to the facts in this case—a finding that cannot be made on this record. But the Mississippi Supreme Court in no sense ignored the merits of this Court's *Pilot Life* decision. Rather, the court declined to consider the preemption issue because petitioner had waived the ERISA defense by failing to raise it at any appropriate stage in the state court proceedings. Thus, petitioner's claim that the Mississippi Supreme Court refused to follow *Pilot Life* solely on the ground that the

case had already been "submitted," *Petition* at 8, grossly mischaracterizes the holding below.<sup>7</sup> The ERISA preemption issue was not considered because petitioner had failed to raise it at any appropriate stage of the proceedings.<sup>8</sup>

In arguing that *Pilot Life* amounted to a supervening "change of law," petitioner appears to suggest *sub silentio* that it should be relieved of the consequences of its failure properly to raise the ERISA defense in the state courts because it should not be held to have anticipated *Pilot Life*. That argument is also meritless. ERISA was adopted in 1974, ten years before the 1984 trial in this case. Petitioner, the thirteenth largest insurance company in the world, with thirty-five in-house lawyers, R. 1414, must have been aware of ERISA and its explicit preemption provision. *Pilot Life* did not set forth a new judge-made rule of preemption, and did not "change" or expand the scope of that statutory preemption provision. Nor did *Pilot Life* overturn or revise any previous judicial interpretation of the scope of ERISA preemption. *Pilot Life* was simply the first occasion for this Court to *apply* the preemption provision Congress

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<sup>7</sup> The full holding on this point was as follows:

"The question of what effect, if any, the Employee Retirement Income Security Act of 1974 (ERISA) . . . as interpreted by *Pilot Life Ins. Co. v. Dedeaux*, — U.S. —, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987), has upon this claim is not addressed, since it was not raised in the lower court or in the appellate briefs and argument. (NOTE that *Pilot* was decided after this case was submitted)."

*Appendix* at 13a, n.3 (statutory citation omitted).

<sup>8</sup> The two cases petitioner cites in support of its argument—*Bell v. Maryland*, 378 U.S. 226 (1964), and *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941)—are inapposite. In both *Bell* and *Vandenbark*, this Court took cognizance of supervening law with respect to issues that had been properly presented and decided on the merits in the lower courts and were thus properly before this Court.



had adopted in 1974. Thus, at all relevant times during the litigation below, petitioner had available all the knowledge it needed to raise the affirmative defense of ERISA preemption, and had no reason to assume that an ERISA preemption defense was foreclosed. Indeed, the defendant in the virtually contemporaneous *Pilot Life* case properly raised ERISA preemption in the trial court as an affirmative defense to a "bad faith" punitive damages claim under Mississippi law. As this Court has held in a closely analogous context, "[w]here the basis of a . . . claim is available, and other defense counsel have perceived and litigated the claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as" a reason for excusing a waiver of state procedural requirements. *Engle v. Isaac*, 456 U.S. 107, 133-134 (1982). To accept the argument that the intervening decision in *Pilot Life* should excuse petitioner's failure to raise the ERISA defense at the time and in the manner prescribed by state law would be to accord no significance to the ERISA statute itself. *Pilot Life* therefore does not excuse petitioner's waiver of the ERISA preemption defense.

In a recent Fifth Circuit decision indistinguishable from the present case, the Court of Appeals held that an insurance company defendant waived the ERISA preemption defense by not raising it in the trial court. *Dueringer v. General American Life Ins. Co.*, — F.2d — (No. 86-4929, 5th Cir., April 15, 1988). In *Dueringer*, as here, a plaintiff had been awarded punitive damages under Mississippi law in an insurance dispute. On appeal, the insurance company argued that the award was preempted, and relied on this Court's decision in *Pilot Life*, which had been rendered after trial but before the appeal was considered. The court ruled that the insurance company had waived the ERISA preemption defense by not raising it at trial. Holding that ERISA preemption "must be raised as an affirmative defense," the court concluded that the appellant had "neg-

lected this legal defense too long to raise the issue first on appeal.” — F.2d at —. That this Court had not decided *Pilot Life* before the trial provided no excuse, the Fifth Circuit determined, for failing to raise that defense at trial.

Finally, petitioner’s curious claim that the Mississippi Supreme Court’s decision not to consider the ERISA issue is “tantamount” to ignoring a valid subject matter jurisdiction objection, *Petition* at 10, is entirely without merit.<sup>9</sup> The ERISA preemption defense is *not* one of “those preemption claims that go to the state’s actual adjudicatory or regulatory power as opposed to the state’s substantive laws.” *International Longshoremen’s Ass’n v. Davis*, 476 U.S. 380, — (1986). Rather, ERISA preemption, as every Court of Appeals to consider the issue has held, is an affirmative defense that, if properly pled and proved, preempts only the state’s substantive laws and not its adjudicatory powers. If a defendant waives the affirmative defense of ERISA preemption, a court has subject matter jurisdiction to adjudicate the merits of the plaintiff’s state law claims. *Dueringer v. General American Life Ins. Co.*, *supra*; *Johnson v. Armored Transport of California, Inc.*, 818 F.2d 1041, 1043-1044 (9th Cir. 1987); *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1497 (9th Cir. 1986). That is precisely what happened in the present case.

Accordingly, petitioner’s ERISA claim cannot appropriately be considered by this Court.

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<sup>9</sup> In Respondent’s Opposition to Petitioner’s unsuccessful application to this Court for a stay, respondent pointed out that ERISA explicitly vests concurrent jurisdiction in state and federal courts to decide ERISA issues. 29 U.S.C. § 1132(e)(1). Respondent’s Opposition to Application For Stay at 7, n.2. Accordingly, it is frivolous to argue that ERISA deprives state courts of subject matter jurisdiction. Petitioner apparently agrees, and is therefore forced to argue that the effect of ERISA is “tantamount” to depriving state courts of subject matter jurisdiction.

## II. PETITIONER HAS PRESENTED NO SUBSTANTIAL FEDERAL QUESTION MERITING REVIEW BY THIS COURT.

Respondent has demonstrated that none of the questions presented in the petition for certiorari may properly be considered by this Court because none of those questions was properly presented to, or decided by, the courts of Mississippi. However, even if this Court were to find that it could properly consider these questions, the particular federal questions raised in the petition do not warrant review under the criteria set forth in Supreme Court Rule 17. The Mississippi Supreme Court has not decided any question of federal law in this case in a way in conflict with the decision of another state court of last resort, a decision of a federal court of appeals, or a decision of this Court. Nor has the Mississippi Supreme Court decided an important question of federal law that has not been, but should be, decided by this Court in the context of this case. See S. Ct. Rule 17.1(b) & (c).

### A. Petitioner's Claim That Punitive Damages Can Only Be Imposed If Constitutional Safeguards Available In Criminal Trials Have Been Provided Does Not Warrant Review.

Petitioner's suggestion that the constitutional protections afforded criminal defendants must be afforded to defendants in civil cases before punitive damages can be awarded has been uniformly rejected by the lower courts.<sup>10</sup> Furthermore, even if petitioner's claim did raise

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<sup>10</sup> *Hansen v. Johns-Manville Products Corporation*, 734 F.2d 1036, 1042 (5th Cir. 1984) (holding double jeopardy clause inapplicable to punitive damage award to private litigant because the determination in such a proceeding "does not carry with it the consequences" necessary for a proceeding to be deemed "essentially criminal," the defendant would "not suffer the stigma normally accompanying criminal proceedings," and "this is not an action brought by the state, but one brought by a private individual"), *cert. denied*, 470 U.S. 1051 (1985); *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.*, 234 Cal. Rptr. 835, 852 (Cal. App. 1987) (rejecting defendant's

substantial constitutional questions, it would be inappropriate to review those questions in the posture they are presented here. Instead of arguing that it was denied

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contention that imposition of punitive damage award without safeguards present in criminal proceedings was a denial of due process, because punitive damage action was civil rather than criminal in nature), *petition for certiorari pending*, 56 U.S.L.W. 3175; *McDermott v. Kansas Public Service Co.*, 238 Kan. 462, 712 P.2d 1199, 1203 (1986) (rejecting claim that punitive damage award violated due process because of its allegedly quasi-criminal nature); *Brotherton v. Celotex Corp.*, 202 N.J. Super. 148, 493 A.2d 1337, 1344-45 (1985) (rejecting claim that punitive damage award "constitutes criminal punishment requiring constitutional guarantees," because court could find "no case law supporting these propositions," and award of punitive damages did not involve finding that defendant violated criminal laws, no stigma attached to punitive award, and the action was privately filed and funded); *Peterson v. Superior Court*, 181 Cal. Rptr. 784, 642 P.2d 1305 (Supr. Ct. 1982) (rejecting claim that ex post facto clause was applicable to civil case involving punitive damages, because "[t]he potential punitive damage award in this case is unquestionably a penalty civil in nature. There is no possibility of the stigma of a criminal conviction nor the potential loss of personal freedom."); *Unified School District No. 409 v. Celotex Corp.*, 6 Kan.App.2d 346, 629 P.2d 196, 206 (1981) (holding that imposition of punitive damages did not violate constitutional guarantee of due process or defendant's right to protection against double jeopardy, reasoning that the imposition of punitive damages "does not approach the severity of criminal sanctions and does not demand the same safeguards as do criminal prosecutions"); *Grimshaw v. Ford Motor Co.*, 119 Cal.App.2d 757, 174 Cal. Rptr. 348, 383 (1981) (rejecting claims that ex post facto and double jeopardy prohibitions were applicable to award of punitive damages in civil case); *Gibson v. Gibson*, 15 Cal.App.3d 943, 93 Cal. Rptr. 617, 621 (1971) (rejecting claim that "due process principles regarding incompetent counsel in criminal proceedings should be transported into civil proceedings" involving punitive damages); *People v. Superior Court*, 115 Cal. Rptr. 812, 819 (Supr. Ct. 1974) (availability of punitive damages "does not convert a civil action into a criminal action" and privilege against self-incrimination is inapplicable to that action); *Toole v. Richardson-Merrell Inc.*, 60 Cal. Rptr. 398, 417-18 (Ct. App. 1967) (rejecting claim that imposition of punitive damages in civil case was unconstitutional because defendant received only six preemptory challenges, a unanimous verdict was not required, the vote of nine jurors was allowed to impose a

a particular constitutional right, petitioner asserts that “some or all” of the constitutional rights provided in criminal proceedings must be afforded in civil cases when punitive damages are sought. *Petition* at (i) (Questions Presented) This ambiguous blunderbuss claim encompasses an extraordinarily broad range of criminal procedures and rules, including the right against double jeopardy, the right of confrontation, proof beyond a reasonable doubt, trial by jury (and associated rights concerning the size of the jury and the need for a unanimous verdict), the right to effective assistance of counsel, the right to a speedy trial, the right against self-incrimination, and many others.<sup>11</sup>

As this Court has often explained, “[e]ach constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in

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penalty, and defendant was denied the presumption of innocence). See generally *United States v. Ward*, 448 U.S. 242 (1980) (provision in Federal Water Pollution Control Act authorizing penalty payable to government “revolving fund” of up to \$5,000 for each violation of Act, which was assessed by considering the size of the business, the effect on the owner’s ability to continue in business, and the gravity of the violation, was a civil penalty and Fifth Amendment’s protection against self-incrimination was inapplicable); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (expressing doubts that plaintiff in civil action under Racketeer Influenced and Corrupt Organizations Act must prove that predicate criminal offenses for RICO violation were committed “beyond a reasonable doubt” despite availability of treble damages if plaintiff prevailed).

<sup>11</sup> Petitioner is not in a position to question the size of the jury or the use of a preponderance standard of proof because petitioner received a trial before twelve jurors, and Jury Instruction 9a, which embodied a preponderance of the evidence standard, was proposed by *Petitioner*. See note 15, *infra*, and Trial Transcript at 2954, Record at 4947. Furthermore, the application of a stricter standard of proof would have made no difference in the present case. The Mississippi Supreme Court specifically found that the evidence supporting the punitive damage award was “overwhelming.” *Appendix* at 12a.

which these factors combine must inevitably vary with the dictate involved." *Johnson v. New Jersey*, 384 U.S. 719, 728 (1966); accord *Brown v. Louisiana*, 447 U.S. 323 (1980). For example the Eighth Amendment is clearly inapplicable to punitive damage awards to private litigants, because the historical function of that Amendment has been to afford protection against the government.<sup>12</sup> Similarly, this Court has ruled that some of the criminal protections available to individual criminal defendants are "personal" rights and are *not* available to corporate entities.<sup>13</sup> Rather than deciding whether all of these criminal procedures should be imposed *en masse* in civil proceedings in which private litigants seek punitive damages from corporate entities, if this Court decides to review these constitutional issues it should do so in cases where *specific* procedures have been requested and have been at issue, so the Court can carefully consider the history and function of each specific procedure and its applicability to proceedings seeking punitive damages from corporate entities.<sup>14</sup>

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<sup>12</sup> *Ingraham v. Wright*, 430 U.S. 651 (1977). Cf. *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 430-31 (1967) ("Of the many policies which authorities have suggested as underlying the privilege against self-incrimination, several reflect a common fear of abuse of government power through the criminal process.").

<sup>13</sup> Petitioner's claim assumes, for example, that a *corporate entity* can invoke the right of an individual criminal defendant not to incriminate himself. This Court has ruled to the contrary. *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974); cf. *Koway Enterprises, Inc. v. Pennsylvania Public Utility Commission*, 85 Pa. Comm. 1, 480 A.2d 1317 (1984) (holding that Cruel and Unusual Punishment Clause does not protect corporations); see generally *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778-79, n.14 (1977) ("certain 'purely personal' [constitutional] guarantees . . . are unavailable to corporations").

<sup>14</sup> Although the question presented in the petition claims that punitive damages may not be imposed absent procedural protections afforded criminal defendants, in passing petitioner raises in the



**B. Petitioner's Claim That The Punitive Damage Award Violated The Excessive Fines Clause Of The Eighth Amendment Does Not Warrant Review.**

Because the Excessive Fines claim has been raised in *Bankers Life and Casualty Co. v. Crenshaw*, No. 85-1765, and has been extensively briefed in that case, respondent here will only briefly state the reasons why there is no urgent reason to review that claim in the context of this case.

First, petitioner's Eighth Amendment claim is directly contrary to this Court's prior decisions that the Eighth Amendment is inapplicable to civil proceedings. *Ingraham v. Wright*, 430 US 651 (1977) (reasoning that Eighth Amendment was intended to protect those "convicted of crimes" and to limit the power of *government* to fine or punish for its own benefit); see Appellee's Brief in *Bankers Life* at 27-28.

Second, petitioner's claim has been uniformly rejected by the lower courts. See *Hart-Anderson v. Hauck*, Civ. No. 85-498 (Mont. March 17, 1987); *Downey Savings and Loan Ass'n v. Ohio Casualty Insurance Co.*, 234 Cal. Rptr. 835, 852 (Cal. App. 1987), *petition for certiorari pending*, 56 U.S.L.W. 3175; *Palmer v. A.H. Robins*, 684 P.2d 187, 217 (Colo. 1984) (en banc); *Unified School District No. 490 v. Celotex Corporation*, 6 Kan. App. 2d

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body of the petition the quite different argument that the standards under which the jury was instructed to impose punitive damages were insufficiently certain to pass constitutional muster. This argument should not be reviewed by this Court for several reasons. *First*, the argument is not properly before the Court. Petitioner has never presented any Due Process question at any stage in the state proceedings, and this particular Due Process question is not fairly encompassed in the different Due Process question presented in the Petition. See Point I.A. *supra*. Second, on the merits this alternative Due Process claim does not present a substantial federal question. Although the Due Process clause does require that a state law provide clear standards with respect to the "conduct it prohibits," *Giacco v. Pennsylvania*, 382 U.S. 399, 402-403 (1966) (cited in

346, 629 P.2d 196, 206 (1981); *Daugherty v. Firestone Tire & Rubber Co.*, 85 F.R.D. 693, 695 (N.D. Ga. 1980); *Zhadan v. Downtown L.A. Motors*, 66 Cal. App. 3d 481, 136 Cal. Rptr. 132, 144 (1976).

Third, this Court's decision in *Ingraham*, and the unanimous body of lower court decisions, are so clearly supported by the common law and colonial history of the Eighth Amendment that there is no need for reexamination of this issue. Appellee's Brief in *Banker's Life* at 30-35. And see in that case the brief of *amici* Consumers Union of U.S., Consumer Federation of America and National Consumer League at 6-40.

Fourth, even if the Excessive Fines Clause did impose a substantive limit on the size of punitive damage awards to plaintiffs in civil litigation, an award would only be "excessive" if it was not proportional to the gravity of petitioner's offense or if it deprived petitioner of its means of livelihood. Appellee's Brief in *Banker's Life* at 37-41. Because those common law tests are satisfied in this case, particularly after the substantial remittitur, acceptance of petitioner's argument would not dictate a different result in this case. In this regard, it should be emphasized that petitioner's constitutional objections are directed at punitive damages awarded pursuant to a jury instruction that *petitioner itself proposed*. See Record at

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*Petition* at 16), there can be no serious issue in this case concerning the clarity of the substantive conduct rules applicable to petitioner. The law has always recognized a wide latitude in prescribing remedies and punishments, including punitive damages, so they will be appropriate to the substantive conduct that gives rise to them. As has been demonstrated in appellee's post-argument brief in *Bankers Life v. Crenshaw*, *supra*, the Due Process Clause does not require definite, inflexible standards governing the imposition of punitive damages, so long as the substantive conduct rules provide a defendant with a sufficiently clear understanding of what conduct is and is not prohibited. Finally, in this case, petitioner was held liable for punitive damages on the basis of a jury instruction that petitioner itself proposed. See note 15, *infra* and accompanying text. Under these circumstances, review by this Court would be wholly inappropriate.



4947-4951 and Jury Instruction 9a.<sup>15</sup> Petitioner cannot plausibly mount a constitutional challenge to the very legal standard petitioner successfully urged the trial court to adopt.

Finally, petitioner has failed to address its Eighth Amendment arguments to the punitive damage award actually imposed in this case—the \$1.5 million award after remittitur. Petitioner had ample opportunity to challenge the excessiveness of that greatly reduced award in a petition for rehearing to the Mississippi Supreme Court, but chose not to do so.

### **C. Petitioner's ERISA Preemption Claim Does Not Warrant Review.**

Nor has petitioner presented any reason why this Court should exercise its discretionary authority to review the ERISA preemption issue that petitioner claims this case presents. On the merits, even assuming the record would support a just resolution of the ERISA preemption issue, the petition does no more than restate the precise issue this Court resolved last Term in *Pilot Life*; the question on the merits in this case, as in *Pilot Life*, is whether

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<sup>15</sup> Jury instruction 9a reads, in relevant part, as follows:

The Court instructs the jury that you may not award punitive damages to the plaintiff in this case for actions of the defendant, The Mutual Life Insurance Company of New York, which are *merely negligent*. Instead, in order to justify an award of punitive damages to the Plaintiff, you must find from a *preponderance of the evidence* that The Mutual Life Insurance Company of New York's actions in denying the claim on the policy on question were so grossly negligent and reckless as to be *the same as an intentional denial*. In other words, before you may award punitive damages to the plaintiff you must find from a preponderance of the evidence in this case that the actions of The Mutual Life Insurance Company of New York in denying the claim contained an element of aggression, malice and insult, or were grossly negligent, or evidenced a reckless disregard for the rights of the Plaintiff.

ERISA preempts Mississippi's common law of punitive damages for bad faith conduct in insurance disputes *if* the insurance was a benefit of an employee benefit plan within ERISA's coverage. There is no reason for this Court to revisit the merits of that question after so brief an interlude.

Because the question presented is not worthy of certiorari on the merits, petitioner has urged this Court to grant review because the action of the Mississippi Supreme Court allegedly "strikes at the very core of this Court's constitutional mandate to determine, and insure compliance with, the law of the land." *Petition* at 10. The petition's implication that the courts of Mississippi are willfully flouting this Court's authority is disingenuous. As respondent has demonstrated, *see* Point I.C. *supra*, the Mississippi Supreme Court declined to consider the applicability of *Pilot Life* because petitioner had waived the affirmative defense of ERISA preemption by failing to raise it at trial and on appeal at an appropriate time and in an appropriate manner. The decision of the Mississippi Supreme Court in this case does not contain the slightest suggestion that the court would refuse to follow *Pilot Life* in a case in which a defendant had properly preserved a defense of ERISA preemption.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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